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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1085

CHYRL MERTH (OVENS) ALLISON, *Petitioner,*

v.

JAMES M. OVENS, JR., *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

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TABLE OF CONTENTS

	Page
Opinions Below	2
Jurisdiction	3
Questions Presented	3
Constitutional Provisions Involved	4
Statement of the Case	4
Argument and Reasons for Granting the Writ	12
Conclusion	18
Certificate of Service	19

TABLE OF CITATIONS

CASES:

Abington School District v. Schempp, 374 U.S. 203 (1963) 16, 17
Boerger v. Boerger, 26 N.J. Super. 90, 97 A. 2d 419 ... 17
Borrow v. El Dorado Lodge, Inc. (1953), 75 Ariz. 218, 254 P. 2d 1027 1
Engel v. Vitale, 370 U.S. 421 (1962) 16
Everson v. Board of Education of Ewing Tp., 330 U.S. 1 (1947) 14, 15
Hacket v. Hacket (1958 Ohio App.), 150 N.E. 2d 431, appeal dismissed 168 Ohio St. 373, 154 N.E. 2d 820 17
McCollum v. Illinois, 333 U.S. 203 (1948) 16
McLaughlin v. McLaughlin, 20 Conn. Sup. 278, 132 A. 2d 420 17
Smith v. Smith, 90 Ariz. 190, 367 P. 2d 230 17
Stanton v. Stanton, 213 Ga. 545, 100 S.E. 2d 289 17
Thomas v. Collins, 323 U.S. 516 (1945) 16
United States v. Carolene Products Co., 304 U.S. 144 (1938) 16
Wood v. Wood, 39 D. Ch. 523, 168 A. 2d 105 17

OTHER AUTHORITIES:

Charles C. Bernstein, "The Disposition of Civil Appeals in the Supreme Court," 5 Ariz. Law Review 175 (1963) 1

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

Petitioner prays that a writ of certiorari issue to review the final judgment of the Supreme Court of the State of Arizona entered in the above-entitled case under date of January 10, 1968, and filed in the Superior Court of the State of Arizona In and For the County of Maricopa of January 12, 1968.*

* Under Arizona practice, the written opinion of the Arizona Supreme Court is not the judgment of that Court. The judgment is contained in the mandate issued by the Clerk of the Arizona Supreme Court and forwarded to the trial court under Rule 14(a) of the Arizona Supreme Court Rules. See *Borrow* v. *El Dorado Lodge, Inc.* (1953), 75 Ariz. 218, 254 P. 2d 1027; Charles C. Bernstein, "The Disposition of Civil Appeals in the Supreme Court," 5 Ariz. Law Review 175, 191-192 (1963).

CITATIONS TO OPINIONS BELOW

The Findings of Fact, Conclusions of Law and Judgment of the Arizona Superior Court for the County of Maricopa, dated September 13, 1965, have not been officially or otherwise reported, and are set forth in Appendix A hereto.

The opinion and decision of the Supreme Court of Arizona in certiorari proceedings concerning the fixing of a supersedeas bond, rendered October 28, 1965, are reported at 99 Ariz. 99, 407 P. 2d. 69, and appear in Appendix B hereto.

The opinion and decision of the Arizona Court of Appeals, Division One, rendered December 29, 1966, affirming the Arizona Superior Court's judgment of September 13, 1965, are reported at 4 Ariz. App. 496, 421 P. 2d 929, and are reproduced in Appendix C hereto.

The Order of the Arizona Supreme Court dated March 29, 1967, granting a Petition for Review, has not been reported and appears in Appendix D hereto.

The opinion and decision of the Supreme Court of Arizona filed on November 22, 1967, affirming in part and reversing in part the decision and judgment of the Arizona Court of Appeals, Division One, are reported at —— Ariz. ——, 433 P. 2d 968, and are contained in Appendix E hereto.

The Order of the Arizona Supreme Court dated January 9, 1968, denying a timely petition for rehearing and applications for a stay is unreported and appears in Appendix G hereto (the petition for rehearing, etc., appearing in Appendix F).

The mandate (i.e., judgment) of the Arizona Supreme Court dated January 10, 1968, is not reported and appears in Appendix H hereto

JURISDICTION

The final judgment of the Supreme Court of the State of Arizona was issued January 10, 1968 (Appendix H hereto). Mr. Justice William O. Douglas, upon application of counsel for petitioner and stipulation of counsel with respect thereto, entered an Order dated January 26, 1968, staying execution and enforcement of the Arizona Supreme Court's judgment pending this Court's consideration of this petition, provided it be filed on or before February 5, 1968.

The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3) since a right, privilege and immunity was claimed under the Constitution of the United States and was denied by the judgment below.

QUESTIONS PRESENTED

1. Under the First and Fourteenth Amendments to the United States Constitution, may a State court require a mother to send her children only to private, sectarian schools controlled by the Church of her divorced husband, and thereafter assert her failure to obey such requirement as a basis for taking her children away from her?

2. Under the First and Fourteenth Amendments to the United States Constitution, and where parents have been previously divorced, may a State court years later take custody of minor children away from their mother and give it to the father because, in whole or in part, the mother has refused to send the children to schools

operated by the father's Church, which is not her faith, and has failed to require the children to attend church on Sunday?

3. Under the First and Fourteenth Amendments to the United States Constitution, may a State court modify the child support requirements of a divorce decree so that college-age minor children will not receive any financial support during the school year unless they agree, against their wishes, to attend a Catholic college?

CONSTITUTIONAL PROVISIONS INVOLVED

First Amendment, U. S. Constitution:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, * * *."

Fourteenth Amendment, U. S. Constitution:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Petitioner, a registered nurse, and respondent, a successful surgeon, were married on January 19, 1941. Shortly prior to their marriage, petitioner had converted to respondent's Roman Catholic faith.

From 1941 to June 29, 1956, the parties became the parents of ten children. Petitioner suffered a hysterectomy following the birth of her last child. Thereafter, in July, 1957, the parties established an $80,000.00 — $90,000.00 irrevocable trust fund from their community property, naming all ten children as beneficiaries. The trust expressly provided:

> "The purpose of this trust is to provide for the education of the beneficiaries in college or professional schools, particularly the sons; provided, however, that the education of said beneficiaries shall be in Catholic colleges, universities, professional schools or other places of learning or education, unless the curriculum they follow is not given in a Catholic institution of learning and, in such case, they may be educated in a non-Catholic institution." (Paragraph IV of Exhibit to Inventory filed Nov. 10, 1958).

On March 31, 1958, petitioner filed suit for divorce in the Superior Court of Arizona for Maricopa County (Phoenix), seeking custody of the ten children and alleging she was a fit and proper person to have their care, custody and control. Respondent admitted petitioner was such a fit and proper person and stipulated that she should have temporary custody pending final hearing.

On December 12, 1958, after a trial, the Superior Court rendered its Judgment and Decree of Divorce finding that the grounds for divorce alleged by petitioner had been proved and were true, and that petitioner was in all respects a fit and proper person to have the care, custody and control of the minor children subject to reasonable rights of visitation in the respondent. A final and absolute divorce was granted

to petitioner, and she was awarded custody of the minor children "except that in accordance with the agreement of the parties, Michael Ovens, the eldest son of the parties, may live with either of the parties as he, Michael, may choose, * * * " (Paragraph 2, page 4, of Judgment and Decree of Divorce). Support in the amount of $100.00 per month per child was awarded to petitioner from respondent. Michael, then age 16, chose to live with respondent.

Petitioner remarried very shortly after the divorce. Three months later respondent petitioned the Court to modify the decree by awarding him "the exclusive care, custody, control and education of the minor children of the parties hereto under the age of fourteen (14) years, and by reducing the amount of support money payments to plaintiff accordingly." (Petition for Modification of Decree of Divorce, filed March 11, 1959.) This would have meant transferring custody of seven children ranging in ages from 3 to 13 to respondent, leaving two daughters, ages 15 and 17, with petitioner.

Petitioner, of course, opposed the attempt to modify the decree. She pointed out that insofar as there was objection to her new husband, she had instituted annulment proceedings against him.*

After trial in May, 1959, the Superior Court of Arizona again expressly found the petitioner to be a fit and proper person to continue in the care, custody and control of the minor children. Respondent's application to change custody of all the children under 14 years of age was denied.

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* Petitioner's brief marriage to her second husband did serve, however, to relieve respondent very promptly from his obligation to pay $300 per month alimony to petitioner.

But the Court went further. After noting that during their married life the parties had both been of the Catholic faith, the Court expressly stated its view "that the children should continue to be educated in accordance with Catholic precepts and in Catholic schools as originally contemplated by the parties * * *." (Order dated June 18, 1959, and filed July 1, 1959). Accordingly, the Court directed petitioner as follows:

> "It Is Further Ordered by this Court that the plaintiff maintain the said children in their present schools or in other suitable Catholic Parochial Elementary and Secondary Schools where she may live, provided that the defendant shall pay, in addition to the amounts heretofore ordered and adjudged to be paid, all necessary amounts for books and tuition incurred at the said schools."

Meanwhile, petitioner changed her religious beliefs and departed the Catholic faith, apparently adopting views akin to the Unitarian faith, but not formally joining any organized church. And in the fall of 1962, she enrolled one son, Kevin, age 12, in the Arizona public schools.

Respondent promptly instituted contempt proceedings against petitioner for violating the Court's order as quoted above, and again petitioned to modify the custody provisions of the divorce decree. Petitioner filed a counter-petition seeking to have the Court remove its requirement that the children in petitioner's custody be maintained in parochial schools. Hotly contested litigation followed, resulting in an Order filed September 23, 1963, transferring custody of three children (Laurel, age 20; Patrick, age 15; and Dennis, age 14) to respondent; expressly holding that re-

spondent was not relieved from his duty to support Janell, age 18, by the trust agreement of July, 1957, "should Janell decide to enter a non-Catholic college;" and leaving the Court-ordered requirement on petitioner to send the children to parochial schools undisturbed and, in fact, unmentioned.

Peace reigned for about a year under this 1963 decree. Both parties remarried during this period. Respondent then instituted the current proceedings by Petition for Order Modifying Divorce Decree and Former Order of the Court, filed December 8, 1964. Respondent for the third time sought a change in the existing custody provisions and expressly asserted, as one of the grounds in support thereof, that petitioner was in violation of the Court's June, 1959, order because she had removed two sons, Kevin and James, from parochial school and entered them in public school. In addition, respondent sought to be relieved from the $100.00 per month support requirement for a 17-year-old daughter, Claire, who had declined to attend a Catholic college and therefore was not receiving funds under the 1957 private trust agreement.

Petitioner on December 21, 1964, filed her response to this latest effort to take her children away, admitting that she had removed Kevin and James from the parochial school they were attending. She expressly claimed "that this Court is without power or authority to enter any order with respect to religion or school provided said children attend some school." (Paragraph III, page 2, of Response to Petition for Order Modifying Decree filed December 24, 1964.) In regard to Claire's refusal to attend a Catholic college, petitioner asserted that "this Court has previously ruled that it was powerless to force the provisions of the

Trust Fund." (Paragraph V, page 2, of Response filed December 24, 1964).

After further pleadings, charges, and counter-charges, the controversy came on for trial during June-August, 1965. During the trial, petitioner's slightly unconventional religious beliefs and practices were thoroughly and repeatedly examined, explored, justified, attacked, and contrasted with respondent's. (See, e.g., pp. 77-80, 84-87, 130-134; 157-158; 174-181, 185-186, 189-191, 340-343, 355, 395-400, 404-408, 651-652, 658, 690-692, 800-802, 833-834 of the trial transcript.) The thread of religious controversy runs throughout the warp and woof of the proceedings. Upon objection by petitioner's counsel that "we are getting into religious things right now," the Court stated that it was "concerned" with whether the children "are getting an *appropriate* religious training." (p. 84, Vol. I, transcript of trial; emphasis added.)

On conclusion of the trial, the Court on September 13, 1965, adopted respondent's proposed findings of fact and conclusions of law and rendered judgment for respondent, taking the care, custody and control of Kevin (age 14), Terrance (age 11), and James Brian (age 9), away from petitioner, and giving it to respondent. In addition, the Court expressly provided that as to the two college-age minor daughters who remained with their mother, "the defendant father should not be required to pay child support to Clare [sic] and Janell Ovens, since they have the option of attending college under the provisions of the trust agreement set up by the parties for their support, education, and welfare." Claire, who had elected to attend a non-Catholic college (Phoenix College) in her home town, was thereby cut off from

all support under the divorce decree and could obtain support under the trust agreement and the Court's judgment only by involuntarily transferring from a non-Catholic to a Catholic college.

As a basis for these rulings, the Court made repeated findings of fact concerning the parties' religious beliefs and practices (see Appendix, pp. A-1-A-4, A-20), including an express finding on the formal charge made in respondent's petition that petitioner had violated the Court's order requiring her to keep her children in parochial schools:

> "(h) That Plaintiff-Respondent has failed and refused to comply with the order of this Court, dated June 11, 1959, which required Plaintiff to maintain the minor children in parochial elementary and secondary schools." (Appendix, p. A-2).

For further example, in finding of fact "b)", the Judge found the home enviroment of respondent father good in part because the children were "taken to church each Sunday" (Appendix, p. A-1), while in finding "e)" (Appendix, p. A-2), he found that in petitioner's home "the children are not taken to church on Sunday;" and the Judge again commented favorably on the church-going habits of respondent father in finding of fact "i)".

Although without power to do so under Arizona law, the trial court ordered the custody of the children changed *forthwith,* and set supersedeas bond in the amount of $50,000.00, an amount beyond petitioner's ability to post. Petitioner immediately appealed the final judgment, and by resort to extraordinary writs obtained both a stay of the trial court's judgment and

a reduction in the supersedeas from $50,000.00 to $4,000.00, which she posted.

In her appeal, it should be noted, petitioner did not challenge the change of custody of her son Terrance, believing that he voluntarily and freely did wish to reside with his father. The appeal, therefore, involved only the custody change of Kevin and James Brian, and the cut off of support for Claire, who had chosen to attend a non-Catholic college, and of Janell, who was not so immediately affected, since she was attending a Catholic college in Hawaii.

On appeal, petitioner vigorously asserted that the action of the Superior Court was in violation of rights protected by the First and Fourteenth Amendments to the U. S. Constitution. The Court of Appeals considered this contention at length (Appendix, pp. A-19-A-23), passed upon its merits, and rejected it. The judgment of the trial court was affirmed in all respects (Appendix C, pp. A-12-A-24).

Petitioner sought review by the Arizona Supreme Court and such review was granted (without further briefing or argument allowed) on March 29, 1967 (Appendix D, p. A-25). After reviewing the cause, the Arizona Supreme Court renderd its opinion on November 22, 1967, affirming in part and reversing in part (Appendix E, pp. A-26-A-32). The part of the lower court's decision that was reversed concerned only the power of the lower court to make a change of custody effective during appeal. The Supreme Court on this point ruled in accord with its earlier decision concerning supersedeas (Appendix B, pp. A-7-A-11) that the trial court had no such power if supersedeas

was posted.* In all other respects, the judgments of the lower courts were affirmed. The Arizona Supreme Court did not discuss or refer to the Constitutional issues concerning religion.

Petitioner filed a timely petition for rehearing (Appendix F, A-33-A-37), in which petitioner also sought, if necessary, a stay pending review by this Court or pending application to this Court for a stay. The petition for rehearing and stay applications were denied on January 9, 1968 (Appendix G, p. A-38), and the mandate (i.e., judgment) of the Arizona Supreme Court issued forth on January 10, 1968, and was filed in the trial court on January 12, 1968 (Appendix H, pp. A-39-A-40). Meanwhile, the status quo was preserved pending petitioner's prompt application to Mr. Justice Douglas for a stay pending review by this Court on certiorari. On stipulation of the parties, Mr. Justice Douglas entered a stay of the Arizona Supreme Court's judgment by Order of January 26, 1968, provided this petition for a writ of certiorari be filed by February 5, 1968.

ARGUMENT AND REASONS FOR GRANTING THE WRIT

Petitioner relies upon the following reasons why the petition for a writ of certiorari should be granted in this case:

Important and substantial issues of federal constitutional law are here presented involving the fundamental freedoms of the First Amendment. The deci-

* The Court pointed out, of course, that if necessary, the custody of the children could be changed pending appeal by application to the appellate court or through juvenile proceedings (Appendix E, p. A-31).

sions of the Arizona courts below, refusing to recognize the claimed federal rights, are in conflict with other state court decisions on the same or related issues and, petitioner submits, in conflict with controlling First Amendment decisions of this Court. The setting of the problem—i.e., child custody cases—is one which arises frequently and continually in every jurisdiction of the nation. The questions presented concerning application of the First and Fourteenth Amendments to court rulings in such cases on the subject of religious education of the children involved, are questions which should be settled by this Court.

The record here demonstrates in stark outline that petitioner has been disqualified, at least in part, because she has failed to maintain her children in religious schools of a particular sect where they would receive religious training contrary to her (and the children's) beliefs, and because she has failed to require attendance by the children at formal church ceremonies on Sunday.* The record further shows that she has lost the right to receive financial support for a minor daughter in her custody because she refuses to compel that daughter to attend a sectarian college against the daughter's wishes.

Surely, such action by a state (or federal) court presents serious First Amendment questions that require this Court's attention and resolution. Petitioner

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* Although constitutionally irrelevant, petitioner testified without contradiction that she is not an atheist or agnostic, that she does believe in God, but does not belong to a church, and that she does instruct her children on religious matters at home (pp. 157-158, transcript of trial).

submits the court action here at issue is in flat violation of both the "freedom of religion" and the "establishment" clauses of the First Amendment.

As this Court stated in *Everson* v. *Board of Education of Ewing Tp.*, 330 U.S. 1, 15-16 (1947):

> "The 'establishemnt of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. *Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will* or force him to profess a belief or disbelief in any religion. *No person can be punished* for entertaining or professing religious beliefs or disbeliefs, *for church attendance or non-attendance.* * * *" (Emphasis added.)

Here, petitioner submits, the Arizona courts have first expressly and in so many words purported to require petitioner to maintain her children in private schools operated by a particular church for the purpose of teaching secretarian religious beliefs. See *Everson* v. *Board of Education of Ewing Tp., supra,* dissenting opinion of Mr. Justice Jackson, 330 U.S. 22-24; and transcript of trial, pp. 174-175. Secondly, upon petitioner's failure to so maintain her children, the Arizona courts have specifically "found" such failure as a fact in support of taking petitioner's children from her.

Such action by a State court simply cannot be squared with the above-quoted language from the *Everson* decision, nor we submit with the First and Four-

teenth Amendments. Not only does such state action aid one religion and prefer that religion over another; it likewise abridges the individual's religious freedom by requiring religious attendance and by "punishing" for religious non-attendance.

Significantly, both the majority and dissenting opinions in *Everson* drew heavily upon Madison's Remonstrance as a guidelight for interpretation of the First Amendment's sparse phrasing. Paragraph 5 of the Remonstrance is particularly here applicable:

> "5. Because the bill implies either that the Civil Magistrate is a competent Judge of Religious Truth; or that he may employ Religion as an engine of Civil policy. The first is an arrogant pretension falsified by the contradictory opinions of Rulers in all ages, and throughout the world: The second an unhallowed perversion of the means of salvation."

Here too, petitioner submits, the Arizona courts have established themselves as judges of religious truth and have employed religion as an engine of civil policy.

Nor does the presumption indulged in by the Arizona Court of Appeals (i.e., that the specific and repeated findings on petitioner's religious beliefs and practices, made by the trial court, were peripheral and not the basis, in whole or in part, of the trial court's judgment divesting petitioner of the custody of her children) eliminate the Federal Constitutional issues here involved. In the first place, the presumption is a violent one which assumes that the trial court was indulging in irrelevancies in making, repeatedly, the findings it did concerning the parties' religious beliefs

and practices — findings which were in response to pleaded charges and which were specifically set forth as the basis for the trial court's conclusions of law and its judgment. Secondly, the presumption itself was based in part on invalid, *in camera* proceedings from which petitioner was excluded and of which no record was made. (See Appendix C, p. A.22-A.23.) Certainly, the preferred place given in our scheme to the great democratic freedoms secured by the First Amendment cannot be defeated and destroyed by indulgence in such dubious "presumptions." This Court, in cases involving First Amendment freedoms, has always reserved to itself the right to examine independently the record and not be bound by such intermediate state court "presumptions." See *United States* v. *Carolene Products Co.,* 304 U.S. 144, 152; *Thomas* v. *Collins,* 323 U.S. 516, 530.

The bald and inescapable fact presented by this record is that petitioner's religion, or lack of religion —i.e., her creed—has been charged in the trial court below and has been expressly found by the trial court below to be a basis for taking her children away from her, and to be a basis for cutting off support for a daughter who remains in her custody. This result is contrary to the prohibitions of the First and Fourteenth Amendments, and to this Court's decisions in the *Everson* and later cases. See *McCollum* v. *Illinois,* 333 U.S. 203 (1948); *Engel* v. *Vitale,* 370 U.S. 421 (1962); *Abington School District* v. *Schempp,* 374 U.S. 203 (1963).

The decision in this case is also contrary to the First Amendment holdings of many of the state courts

arising in child custody cases. One of the most exhaustive treatments of the problem is found in *Hacket* v. *Hacket* (1958 Ohio App.), 150 N.E. 2d 431, appeal dismissed 168 Ohio St. 373, 154 N.E. 2d 820.* In *Hacket,* the Ohio court said:

> "Coming directly to the point to be decided, it is our conclusion that the provisions of the separation agreement, dealing with the promise of the mother to see to it that the daughter placed in her custody be reared in the Catholic faith and attend a school affiliated with the Catholic Church, cannot be enforced by judicial decree." 150 N.E. 2d at 434.

Hacket was decided on strict constitutional principles:

> "The force of this provision is to make observance of religious doctrine a matter of personal choice uncontrolled by law *or decree of court.*" 150 N.E. 2d at 433. (Emphasis added.)

See, also, *Wood* v. *Wood,* 39 D. Ch. 523, 168 A. 2d 105; *Boerger* v. *Boerger,* 26 N.J. Super. 90, 97 A. 2d 419; *Smith* v. *Smith,* 90 Ariz. 190, 367 P. 2d 230; *McLaughlin* v. *McLaughlin,* 20 Conn. Sup. 278, 132 A. 2d 420; *Stanton* v. *Stanton,* 213 Ga. 545, 100 S.E. 2d 289.

The glaring conflict between the decision in this case and the above decisions of other state courts on the First Amendment issues here presented, requires resolution by this Court.

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* This case was cited in *Abington School District* v. *Schempp, supra,* concurring opinion of Mr. Justice Brennan, 374 at 243-244, n. 9.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Certificate of Service

I Hereby Certify that three true copies of the foregoing Petition for a Writ of Certiorari and Appendix thereto were mailed air mail, postage prepaid, to Charles M. Brewer, Esq., 216 Luhrs Building, Phoenix, Arizona, 85003, this 5th day of February, 1968.

NEAL P .RUTLEDGE